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# HIV-SPECIFIC KNOWING TRANSMISSION STATUTES: A PROPOSAL TO HELP FIGHT AN EPIDEMIC

## INTRODUCTION

Since the outbreak of the HIV-AIDS<sup>1</sup> epidemic, the legal community has sought ways of balancing the civil liberties of HIV-positive individuals with public health policies designed to protect society from the spread of the deadly virus. One of the main tenets of this debate is how to prosecute individuals who knowingly transmit the HIV virus. Originally prosecutors sought to charge individuals who knowingly transmitted the HIV virus to others under traditional criminal statutes.<sup>2</sup> It quickly became apparent, however, that the unique nature of these cases made such prosecutions difficult.

In response to the inherent difficulties in prosecuting knowing transmission cases under traditional criminal laws and the media attention that those cases attract,<sup>3</sup> state legislatures

<sup>1</sup> See REPORT OF THE PRESIDENTIAL COMM'N ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC 8, 15 (1988); U.S. DEP'T OF HEALTH AND HUMAN SERVS., SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME 11-12, 20 (1986), reprinted in Colloquy, *Criminalization of an Epidemic: HIV-AIDS and Criminal Exposure*, 46 ARK. L. REV. 921, 922 (1994). HIV-AIDS is the abbreviation for Human Immunodeficiency Virus – Acquired Immune Deficiency Syndrome. *Id.* Acquired Immune Deficiency Syndrome (AIDS) is a potentially fatal disease that begins with the transmission of Human Immunodeficiency Virus (HIV). *Id.* Infection with the HIV virus begins with gradual erosion of the infected individual's immune system. *Id.* Infected individuals may remain in an asymptomatic state for as long as nine years or longer. *Id.* Once HIV develops into full-blown AIDS, those individuals may live for several years. *Id.* Ultimately, those infected will not die from the HIV-AIDS virus, but from infection they contract as a result of their suppressed immune system. *Id.*

<sup>2</sup> See Erin M. O'Toole, *HIV-Specific Crime Legislation: Targeting an Epidemic for Criminal Prosecution*, 10 J.L. & HEALTH 183, 186 (1995/1996) (noting that "[t]he available offenses for prosecution [in knowing transmission cases] included homicide, attempted homicide, rape, criminal assault, reckless endangering, prostitution, and sexually transmitted disease statutes").

<sup>3</sup> See, e.g., Margaret Brazier, *At Large With A Lethal Weapon; Should the willful transmission of AIDS be made a crime?*, THE GUARDIAN, June 24, 1992, at F19 (describing local case where HIV-positive man, whom the author describes as "a murderer in disguise," knowingly transmitted virus through sexual intercourse to at least four

throughout the nation have responded by enacting HIV-specific criminal legislation for cases involving the knowing transmission of the virus.<sup>4</sup> These statutes were drafted to give "clear notice of socially unacceptable standards of behavior" and provide a means for punishment of those who knowingly transmit the HIV-AIDS virus.<sup>5</sup> These statutes have been attacked on two fronts: constitutional grounds<sup>6</sup> and public policy grounds.<sup>7</sup> This Note

women); Lawrence O. Gostin, *Criminal Law Won't Stop AIDS*, L.A. TIMES, July 6, 1987, Part II, at 5 (describing case where defendant was charged with attempted murder for selling his HIV-infected blood to area blood bank); Terry Pristin, *Key Witness Refuses to Testify in AIDS Murder Attempt Trial*, L.A. TIMES, Sept. 2, 1987, at M3 (describing charges of attempted murder against defendant for knowingly attempting to transmit HIV to another man through unprotected sex); Mack Reed, *Area Man Is Accused of Passing AIDS Virus*, L.A. TIMES, Jan. 12, 1991, at B1 (reporting that Los Angeles man was prosecuted for having sex with woman on number of occasions without disclosing his HIV-positive status to her, resulting in infection of both her and child); Lynne Robertson, *Fiscal to Study Claim Over HIV Infection; Former Girlfriend Accused*, THE HERALD, Feb. 10, 1998, at 1 (describing case where woman knowingly infected her former boyfriend with HIV virus); *Man Gets 9-Year Prison Term for Exposing Girl to HIV, Drugs*, CHI. TRIB., Dec. 1, 1992, at M5 (reporting 65 month prison sentence handed down to HIV-positive individual for attempted murder after he knowingly exposed HIV virus to seventeen-year-old girl through sexual intercourse).

<sup>4</sup> See Lynda Richardson, *Wave of Laws Aimed at People With HIV*, N.Y. TIMES, Sept. 25, 1998, at A1 (noting that one-third of those statutes have been enacted in last three years alone). See, e.g., ARK. CODE ANN. § 5-14-123(b) (Michie Supp. 1993) (stating that "[a] person commits the offense of exposing another to human immunodeficiency virus if the person . . . exposes another . . . without first having informed the other person of the presence of the human immunodeficiency virus"); FLA. STAT. § 384.24 (1998) (prohibiting sexual intercourse by HIV-positive individuals, unless expressly consented to by partner); GA. CODE ANN. § 16-5-60(c) (Michie Supp. 1992) (criminalizing knowing engagement of behavior likely to transmit HIV without disclosure); IDAHO CODE § 39-608 (Supp. 1992) (criminalizing intentional "[t]ransfer of bodily fluid which may contain the HIV virus"); ILL. ANN. STAT. ch. 38 paragraph 12-16.2 (Smith-Hurd Supp. 1992) (making criminal transmission of HIV class 2 felony); IOWA CODE § 709C1 (1999) (criminalizing knowing transmission of HIV); KY. REV. STAT. ANN. § 529.090 (Baldwin 1991) (providing separate charge for prostitutes who knowingly transmit HIV); LA. REV. STAT. ANN. § 43.5 (West Supp. 1993) (criminalizing intentional exposure of HIV to another without consent); MD. HEALTH GEN. CODE ANN. § 18-601.1 (1990) (providing for misdemeanor offense in cases where "who has the human immunodeficiency virus . . . knowingly transfer[s] or attempt[s] to transfer the human immunodeficiency virus to another individual"); MICH. COMP. LAWS § 333.5210 (1992) (stating that individual who knows they are HIV-positive and performs "sexual penetration" without other party's consent is guilty of felony); MO. ANN. STAT. § 191.677 (Vernon Supp. 1993) (criminalizing reckless conduct exposing another to risk of infection); NEV. REV. STAT. § 441A.300 (Michie 1991) (criminalizing knowing or willful conduct intended or likely to transmit HIV); N.D. CENT. CODE § 12.1-20-17 (1999) (providing that person who willfully transfers HIV-infected body fluid to another is guilty of class A felony); OKLA. STAT. ANN. tit. 21, § 1192.1 (West Supp. 1993) (criminalizing "[k]nowingly engaging in conduct reasonably likely to transfer HIV virus"); PA. C. S. § 2701 (1999) (criminalizing intentional or knowing conduct by prison inmates which put another in contact with HIV-infected fluids); S. C. CODE ANN. § 44-29-145 (Law. Co-op. Supp. 1992) (criminalizing knowing transmission of HIV).

<sup>5</sup> See REPORT, *supra* note 1, at 130 (reporting findings that states should enact HIV-specific knowing transmission statutes).

<sup>6</sup> See, e.g., *People v. Jensen*, 231 Mich. App. 439, 443 (1998) (challenging Michigan's knowing transmission statute because it "(1) includes both consensual and nonconsensual

will address the constitutional challenges to knowing transmission statutes. The New York State Legislature has recently proposed such legislation,<sup>8</sup> and these proposals have attracted much attention. When properly drafted, these statutes ensure that those who knowingly transmit the HIV virus are punished and provide the deterrent effect necessary to prevent knowing transmission cases.

Part I of this Note discusses the case of Nushawn Williams; a resident of rural Chautauqua County in upstate New York who was responsible for one of the worst HIV-AIDS epidemics to hit a single community. Part II addresses the problems faced by prosecutors attempting to fit knowing transmission cases under traditional laws. Part III discusses knowing transmission statutes that specifically target the knowing transmission of the HIV-AIDS virus, with particular emphasis on a proposal

acts and (2) fails to require an intent to cause harm"); *People v. Russell*, 158 Ill. 2d 23, 25 (1994) (challenging Illinois' knowing transmission statute as "so vague as to deny the defendants due process of law").

<sup>7</sup> See Lawrence O. Gostin, *The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties*, 49 OHIO ST. L.J. 1017, 1041-42 (1989) (arguing that any rush to institute knowing transmission statutes merely ignores "the failure of previous attempts to control venereal disease"); Eric L. Schulman, *Sleeping With the Enemy: Combating the Sexual Spread of HIV-AIDS Through a Heightened Legal Duty*, 29 J. MARSHALL L. REV. 957, 977 (1996) (indicating that knowing transmission statutes do not prevent spread of HIV because majority of people do not know they have HIV); see also Deborah Pinkney, *AIDS Becomes Issue for Courts; HIV-Related Cases on the Rise*, CHI. SUN-TIMES, Dec. 7, 1992, at 16 (arguing that criminalization will only perpetuate prejudices against HIV-positive individuals).

<sup>8</sup> See S.B. 3017, 222nd Leg., 1st Spec. Sess. (N.Y. 1999); A.B. 5501, 222nd Leg., 1st Spec. Sess. (N.Y. 1999). The proposals before the New York State Senate and Assembly, referred to the Codes Committees, establishes the crime of reckless endangerment of the public health in the first and second degree:

Section 120.26: Reckless Endangerment Of The Public Health In The First Degree. A person is guilty of reckless endangerment of the public health in the first degree when he or she is aware that he or she has tested positively for HIV/AIDS and then recklessly engages in conduct which results in the transmission of HIV/AIDS to another person who was unaware of such condition. A woman who transmits the HIV/AIDS virus to her child as a result of giving birth to that child shall not be prosecuted under this section. . . . Reckless endangerment of the public health in the first degree is a class B felony.

*Id.*

Section 120.27: Reckless Endangerment Of The Public Health In The Second Degree. A person is guilty of reckless endangerment of the public health in the second degree when he or she is aware that he or she has tested positively for HIV/AIDS and then recklessly engages in conduct which creates a substantial risk of transmission of HIV/AIDS to another person who was unaware of such condition. A woman who transmits the HIV/AIDS virus to her child as a result of giving birth shall not be prosecuted under this section. . . . Reckless endangerment of the public health in the second degree is a class C felony.

*Id.*

currently before the New York State Legislature. Part IV examines the constitutional challenges that defendants have brought against knowing transmission statutes. Part V offers a recommendation for the enactment of a narrowly worded HIV-specific knowing transmission statute in New York. This Note posits that a carefully drafted knowing transmission statute could strike the delicate balance between punishing those who commit such reprehensible acts, while protecting the civil liberties of innocent HIV-positive individuals.

### I. THE NUSHAWN WILLIAMS CASE

In October of 1997, the rural community of Chautauqua County in upstate New York became the center of one of the worst outbreaks of HIV-AIDS to hit this country since its inception.<sup>9</sup> Nushawn Williams was at the heart of this controversy because, despite knowing of his HIV-positive status, he engaged in unprotected sex with numerous women in the community.<sup>10</sup> In May of 1998, a Chautauqua County grand jury indicted Williams on two counts of second-degree statutory rape.<sup>11</sup> In August of 1998, Williams was also indicted by a Bronx County grand jury on two felony charges: Reckless Endangerment in the First Degree and Attempted Assault in the

<sup>9</sup> See Amy M. Decker, *Criminalizing the Intentional or Reckless Exposure to HIV: A Wake-Up Call to Kansas*, 46 KAN. L. REV. 333, 333 (1998) (describing Nushawn Williams actions and his effect on surrounding community); Richard N. Gottfried, *Symposium on Health Care Policy: What Lessons Have We Learned from the AIDS Pandemic: Article: Lessons from Chautauqua County*, 61 ALB. L. REV. 1079, 1082 (1998) (describing Williams actions as "horrible"); see also Richard Perez-Pena, *Two Births Lengthen List In One-Man H.I.V. Spree*, N.Y. TIMES, Jan. 29, 1998, at B5 (describing Williams's case as "one of the most notorious outbreaks of H.I.V. . .").

<sup>10</sup> See Trent T. Gegax, *The AIDS Predator*, NEWSWEEK, Nov. 10, 1997, at 53 (stating that Nushawn Williams may have exposed as many as 100 people, if not more); Mark Hansen, *Can the Law Stop AIDS?*, ABA JOURNAL, May 1998, at 26 (noting that at least 16 of those women in both Chautauqua County and New York City are now known to have tested positive for HIV); Perez-Pena, *supra* note 9, at B5 (noting that investigators have identified 48 sexual partners of Nushawn Williams in Chautauqua County, and that Williams stated he had sex with 50 to 75 other women in New York City); Richardson, *supra* note 4, at A1 (indicating that as a result of Nushawn Williams infecting over dozen young women, 29 states responded by criminalizing knowing transmission of HIV); Jennifer Tanaka & Gregory Beals, *The Victims' Stories*, NEWSWEEK, Nov. 10, 1997, at 55 (noting that according to public health officials estimate that Mr. Williams had sex with as many as 43 women in Chautauqua County, and at least 28 more in New York City).

<sup>11</sup> See Sheila McCarthy, *HIV-Infected Williams Indicted on Two Counts of Statutory Rape*, THE BUFFALO NEWS, May 21, 1998, at 5B (noting that Chautauqua County District Attorney's Office plans to coordinate prosecution of Williams with Bronx County District Attorney's Office).

Second Degree.<sup>12</sup>

In February of 1999, Williams pleaded guilty in Bronx County to reckless endangerment for having exposed a woman to the HIV virus.<sup>13</sup> A week after this agreement, Williams pled guilty in Chautauqua County to two counts of rape in the second degree and reckless endangerment in the first degree.<sup>14</sup> On April 5, 1999, Williams was sentenced in Chautauqua County Court to 4 to 12 years in prison.<sup>15</sup> Ten days later, on April 15, 1999, Williams was sentenced in Bronx County Supreme Court to 6 years imprisonment.<sup>16</sup> Pursuant to the plea agreements Williams will serve his sentences concurrently.<sup>17</sup>

The prosecutor in Williams' case would have faced unique difficulties had they attempted to try the case under the rubric of traditional criminal laws.<sup>18</sup> While prosecuting knowing transmission cases under traditional criminal laws is difficult, cases have been successfully tried under traditional penal statutes.<sup>19</sup> Most of these cases have been prosecuted as

<sup>12</sup> See Mark Hamblett, *HIV Carrier Indicted for Unprotected Sex; Bronx DA Charges Nushawn Williams with Reckless Endangerment, Assault*, N.Y.L.J., Aug. 20, 1998, at 1 (noting importance of Williams case, Anthony Girese, counsel to Bronx District Attorney Robert Johnson, stated "[t]here have been a few needle or bite cases but this appears to be the first reckless endangerment prosecution [for sexual transmission]").

<sup>13</sup> See Amy Waldman, *Guilty Plea in an H.I.V. Exposure Case*, N.Y. TIMES, Feb. 19, 1999, at B3 (noting that prosecutors are also weighing whether to charge Williams "with assault in instances in which the authorities believe he knowingly infected women with H.I.V. . . ."); *Today's News*, N.Y.L.J., Feb. 19, 1999, at 1 (stating that Williams, first person indicted in New York for knowingly transmitting HIV to sex partner, pled guilty to first degree reckless endangerment).

<sup>14</sup> See *Man Pleads Guilty in Rape Cases And Exposing Woman to H.I.V.*, N.Y. TIMES, Feb. 27, 1999, at B6 (stating that "[t]he deal was reached months ago between Mr. Williams, Chautauqua County and Bronx County").

<sup>15</sup> See *Today's News*, N.Y.L.J., April 6, 1999, at 1 (stating that sentencing was result of an earlier plea agreement to charges of second-degree rape and reckless endangerment); Richard Perez-Pena, *Drifter Gets 4 to 12 Years in HIV Case*, N.Y. TIMES, April 6, 1999, at B1 (noting that only two victims were willing to testify).

<sup>16</sup> See Ralph R. Ortega & Raphael Sugarman, *HIV-Infected Man Gets 6-Year Term*, N.Y. DAILY NEWS, April 16, 1999, at 31 (noting that investigators charged that Williams traded drugs for sex with young women).

<sup>17</sup> See *Man Pleads Guilty*, *supra* note 14, at B6. In Chautauqua County, Williams could have received 2 to 6 years in prison for each rape count, and 4 to 12 years on the charge of reckless endangerment. *Id.* In Bronx County, Williams was sentenced to the maximum of a possible 2 to 6 years. See Waldman, *supra* note 13, at B3; *Today's News*, *supra* note 13, at 1.

<sup>18</sup> See Jody B. Gabel, *Liability For "Knowing" Transmission Of HIV: The Evolution Of A Duty To Disclose*, 21 FLA. ST. U.L. REV. 981, 994 (1994) (discussing early reports in newspapers of perception that prosecutors faced near impossibility in getting conviction in a knowing transmission case).

<sup>19</sup> See *id.* In 1990, there were fifty-four HIV-related criminal prosecutions in the United States that resulted in convictions for either assault or attempted murder. *Id.*;

attempted murders or assaults.<sup>20</sup> Oftentimes, the particular facts of these cases will hinder the prosecution's ability to prove such essential elements as intent<sup>21</sup> and causation.<sup>22</sup>

Due to the unique nature of the disease proving intent often becomes problematic when attempting to fit knowing transmission cases under traditional criminal law statutes. Prosecuting knowing transmission cases often hinges on the subtle differences between intention and indifference.<sup>23</sup> In cases where the prosecution has been successful,<sup>24</sup> defendants have stated their intentions to infect the victims.<sup>25</sup> Many times,

citing Lawrence O. Gostin, *The AIDS Litigation Project, A National Review of Court and Human Rights Commission Decisions, Part I: The Social Impact of AIDS*, 263 J. AM. MED. ASSOC. 1961 (1990). Whereas just a few years earlier, such cases were virtually unheard of. *Id.* at 1961; see also Rorie Sherman, *Criminal Prosecutions On AIDS Growing*, NAT'L L.J., Oct. 14, 1991, at 3. The number of knowing transmission cases had risen to 840 in 1991. *Id.*

<sup>20</sup> See J. Kelly Strader, *Criminalization As A Response To A Public Health Crisis*, 27 J. MARSHALL L. REV. 435, 437 (1994). Such prosecutions are viable "in cases where there is sufficient evidence for a jury to find beyond a reasonable doubt that the defendant intended to transmit the virus." *Id.* However, due to the unique nature of the HIV-AIDS virus, there has never been a homicide prosecution in the United States for intentionally or recklessly exposing another to HIV. *Id.* See also Decker, *supra* note 9, at 340. The nature of the disease will often times lead to the death of the defendant before the victim, therefore, a homicide prosecution is not possible because the victim will not have died. *Id.* Gostin, *supra* note 7, at 1042 n.129. There are inherent difficulties in attempting to try a knowing transmission case as homicide or manslaughter because the victim must have already died. *Id.* MODEL PENAL CODE §210.1 (1985). The Model Penal Code states that an individual must cause the death of another person in a criminal homicide prosecution. *Id.*

<sup>21</sup> See MODEL PENAL CODE §2.02 (Official Draft 1962). The Model Penal Code states the minimum requirements of culpability as follows: "[A] person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense." *Id.*

<sup>22</sup> See MODEL PENAL CODE §2.03 (Official Draft 1962). The Model Penal Code requires that a causal relationship between conduct and the result exist, stating: "Conduct is the cause of a result when: (a) it is an antecedent but for which the result in question would not have occurred; and (b) the relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the offense." *Id.*

<sup>23</sup> See, e.g., *Smallwood v. State*, 680 A.2d 512, 517 (Md. 1996) (stating that court, in reversing the defendant's convictions for attempted murder and assault with intent to murder, had "no trouble concluding that [the defendant] intentionally exposed his victims to the risk of HIV-infection. The problem . . . is whether knowingly exposing someone to a risk of HIV-infection is by itself sufficient to infer that [the defendant] possessed an intent to kill."); see also Jenifer Grishkin, *Knowingly Exposing Another to HIV*, 106 YALE L.J. 1617, 1618 (1997) (noting that Court of Appeals in Maryland became first court to address "whether knowingly exposing someone to a risk of HIV-infection is by itself sufficient to infer . . . an intent to kill").

<sup>24</sup> See, e.g., *State v. Haines*, 545 N.E.2d 834, 835 (Ind. Ct. App.2d 1989) (reinstating jury's guilty verdict for attempted murder where HIV-positive defendant intended to transmit disease to others); *Brock v. State*, 555 So. 2d 285, 289 (Ala. Crim. App.1989) (holding HIV-positive defendant guilty of third-degree assault after he bit corrections officer).

<sup>25</sup> See, e.g., *United States v. Moore*, 846 F.2d 1163, 1165 (8th Cir. 1988) (during

however, these cases, particularly those involving sexual intercourse, do not have such a clear manifestation of intent.<sup>26</sup> Where intent must be inferred based on the defendant's actions alone,<sup>27</sup> courts have been reluctant to find criminal liability.<sup>28</sup>

Proving causation also becomes problematic when attempting to fit knowing transmission cases under traditional criminal law statutes.<sup>29</sup> The HIV virus does not actually kill the individual; instead, an infection affects the victim's suppressed immune system and death may result after a period of time.<sup>30</sup> Prosecutors

struggle, defendant threatened to kill guards and later reiterated his hopes that they get his disease); *Scroggins v. State*, 401 S.E.2d 13, 15 (Ga. App. 1991) (concluding that defendant had requisite intent, when, after victim was bit and asked whether defendant had AIDS, defendant "just looked at him and laughed"); *State v. Haines*, 545 N.E.2d 834, 835 (Ind. Ct. App.2d 1989) (during altercation, defendant shouted that he wanted to "give it [HIV-AIDS] to him [the victim]"); *State v. Caine*, 652 So.2d 611, 613 (La. App. 1995) (upholding conviction of defendant who jabbed used syringe into victim's arm and shouted "I'll give you AIDS"); *State v. Smith*, 621 A.2d 493, 495 (N.J. Super. Ct. App. Div. 1993) (upholding defendant's conviction where he threatened to kill police officer by biting and spitting at him); *State v. Hinkhouse*, 912 P.2d 921, 924 (Or. Ct. App. 1996) (upholding defendant's conviction where he stated that "if he were [HIV]-positive, he would spread the disease to other people."); *Weeks v. State*, 834 S.W.2d 559, 561 (Tex. Ct. App. 1992) (during incident, defendant stated that he was "going to take somebody with him when he went"); *State v. Stark*, 832 P.2d 109, 112 (Wash. Ct. App. 1992) (convicting defendant based on his statements that, "I don't care. If I'm going to die, everybody's going to die.").

<sup>26</sup> See Gabel, *supra* note 18, at 1004 (noting that "charges of attempted murder based on the knowing transmission of HIV through sexual intercourse infrequently include manifestations of intent through murderous threats").

<sup>27</sup> See, e.g., *Smallwood v. State*, 680 A.2d 512, 514 (Md. 1996) (rejecting prosecution's argument that facts of case were sufficient to infer intent to kill where HIV-positive individual raped woman).

<sup>28</sup> See *id.* at 513 (reversing defendant's conviction of attempted murder and assault with intent to murder by exposing victims to HIV).

<sup>29</sup> See Gabel, *supra* note 18, at 984 (describing how protracted period of time in which HIV-positive individual remains symptom-free provides unique problems from standpoint of prosecutor attempting to prove that particular defendant was, in fact, one who transmitted disease to victim); see also Gina Kolata, *How AIDS Smolders: Immune System Studies Follow the Tracks of H.I.V.*, N.Y. TIMES, Mar. 17, 1992, at C1 (describing how the HIV virus can remain in one's system symptom-free for periods of up to ten years).

<sup>30</sup> See, e.g., GERALD J. STINE, *ACQUIRED IMMUNE DEFICIENCY SYNDROME: BIOLOGICAL, MEDICAL, SOCIAL, AND LEGAL ISSUES* 35 (1993) (stating that AIDS is not what ultimately kills HIV-positive individual, but opportunistic infections); Lori A. David, *The Rights and Responsibilities of People With HIV or AIDS: The Legal Ramifications in Criminal Law of Knowingly Transmitting AIDS*, 19 LAW & PSYCHOL. REV. 259, 261 (1995) (noting that "the virus' destruction of the immune system does not itself lead to death, the infection frequently leads to infections and malignancies" which are what ultimately kills an HIV-positive individual); Decker, *supra* note 9, at 336 (noting that AIDS patients are not killed by HIV, but by subsequent infections due to patient's suppressed immune system); Rebecca Ruby, *Apprehending The Weapon Within: The Case For Criminalizing The Intentional Transmission Of HIV*, 36 AM. CRIM. L. REV. 313, 327 (1999) (noting that in many cases victim will die before defendant); Cathleen J. Schaffner, *Inferring The Intent Of An AIDS Rapist: Smallwood v. State*, 14 T.M. COOLEY L. REV. 375, 376 (1997) (noting that HIV leaves immune system severely weakened and body unprotected against "opportunistic infections").



must overcome the difficulty of proving that the defendant was the one who in fact transmitted the virus to the victim.<sup>31</sup> Proving that the defendant actually infected the victim can be difficult because it may take months or years for a victim to learn that he or she has been infected.

Individuals pose a danger to society by knowingly transmitting the HIV virus and should be brought to justice. Despite numerous well-publicized cases to the contrary,<sup>32</sup> instances involving the knowing transmission of HIV are rare.<sup>33</sup> Legislatures and courts, however, must ensure that remedies which address those cases involving the knowing transmission of HIV, punish those who are in fact culpable.<sup>34</sup>

## II. KNOWING TRANSMISSION PROSECUTIONS UNDER TRADITIONAL CRIMINAL LAWS

### A. Problems in Proving "Intent"

Since the inception of the HIV virus, state courts have faced the challenge of attempting to fit knowing transmission cases under traditional criminal laws. An important difficulty a prosecutor faces is attempting to prove that the defendant

<sup>31</sup> See Strader, *supra* note 20, at 437 (discussing difficulties prosecutors may face in proving causation in defendant's murder trial for knowingly transmitting HIV); see generally Grishkin, *supra* note 23, at 1621 (noting that "year and a day" rule may preclude prosecution in some knowing transmission cases); Kimberly A. Harris, *Death at First Bite: A Mens Rea Approach in Determining Criminal Liability for Intentional HIV Transmission*, 35 ARIZ. L. REV. 237, 240-41 (1993) (claiming that the indicia of transmission does not arise some time after transmission); Jacob A. Heth, *Dangerous Liaisons: Criminalizing Conduct Related to HIV Transmission*, 29 WILLAMETTE L. REV. 843, 855 (1993) (discussing problems in proving causation).

<sup>32</sup> See, e.g., Brazier, *supra* note 3, at F19 (describing case of local man who knowingly transmitted HIV to a woman); Gostin, *supra* note 3, at Part II, 5; Pristin, *supra* note 3, at M3 (describing case of HIV-infected male selling contaminated blood to blood bank); Reed, *supra* note 3, at B1 (reporting about case of HIV-infected male knowingly transmitting the virus to woman and child); Robertson, *supra* note 3, at 1 describing case of woman knowingly infecting her former boyfriend with HIV virus); *Man Gets 9-Year Prison Term*, *supra* note 3, at M5.

<sup>33</sup> See Gabel, *supra* note 18, at 982 n.11 (noting that "[o]f the estimated one million individuals infected with HIV, the number of cases involving intentional or knowing attempts to transmit HIV constitute a minute portion of this population").

<sup>34</sup> See generally David Robinson, Jr., *AIDS and the Criminal Law: Traditional Approaches and a New Statutory Proposal*, 14 HOFSTRA L. REV. 91, 105 (1985) (noting importance of criminal punishment for those who knowingly transmit HIV); Stefanie S. Wepner, *The Death Penalty: A Solution to the Problem of Intentional AIDS Transmission Through Rape*, 26 J. MARSHALL L. REV. 941, 971-73 (1993) (arguing death penalty in certain knowing transmission cases).

intended to transmit the HIV virus to the victim. Proving intent is problematic in all but a very few cases where the defendant may overtly state his or her intention to transmit the virus.<sup>35</sup> This difficulty was clearly illustrated in the Maryland Court of Appeals decision in *Smallwood v. State*.<sup>36</sup> In overturning three attempted murder convictions of defendant Dwight Ralph Smallwood,<sup>37</sup> the court acknowledged the inherent problems in trying knowing transmission cases under traditional criminal laws.<sup>38</sup>

The Maryland Court of Appeals concluded that circumstantial evidence of intent to expose others to the risk of HIV-infection was not enough to infer an "intent to kill."<sup>39</sup> The court addressed the unique characteristics of the HIV-AIDS virus in considering the amount of risk to which victims were exposed.<sup>40</sup> The court

<sup>35</sup> See R. Brian Leech, *Criminalizing Sexual Transmission of HIV: Oklahoma's Intentional Transmission Statute: Unconstitutional or Merely Unenforceable?*, 46 OKLA. L. REV. 687, 695 (1993) (noting difficulty prosecutors face in proving intention); Ruby, *supra* note 30, at 326 (noting difficulty prosecutors face in proving intent, "aside from the most extreme cases where there is an overt statement or demonstration of intent by the defendant").

<sup>36</sup> 680 A.2d 512 (Md. 1996). Smallwood was diagnosed and informed as having the HIV virus in 1991. *Id.* at 513. A social worker had warned him that he needed to practice safe sex because he posed a risk of transmitting the virus to a sexual partner. *Id.* Two years later, Smallwood and an accomplice were arrested for forcibly raping three female victims on three separate occasions in September of 1993. *Id.* Smallwood was convicted of attempted second-degree murder for each of his victims. *Id.* at 513-14. Smallwood argued that the trial court lacked sufficient evidence to conclude that he intended to kill his three victims. *Id.* Smallwood challenged that simply because "he engaged in unprotected sexual intercourse, even though he knew he carried HIV, [was] insufficient to infer an intent to kill." *Id.* The State argued that the factual record was sufficient to infer an intent to kill, likening "Smallwood's HIV-positive status to a deadly weapon and [argued] that engaging in unprotected sex when one is knowingly infected with HIV is equivalent to firing a loaded firearm at that person." *Id.* The State cited cases from other jurisdictions that they argued justified inferring an intent to kill in knowing transmission cases. *Id.* at 516-17.

<sup>37</sup> See *id.* at 518. (concluding "that Smallwood's convictions for attempted murder and assault with intent to murder must be reversed").

<sup>38</sup> See *id.* at 517 n.4. (stating "[w]e have no trouble concluding that Smallwood intentionally exposed his victims to the risk of HIV-infection. The problem . . . is whether knowingly exposing someone to a risk of HIV-infection is . . . sufficient to infer that Smallwood possessed an intent to kill").

<sup>39</sup> See *id.* at 513. "In this case, we examine the use of circumstantial evidence to infer that a defendant possessed the intent to kill needed for conviction of attempted murder or assault with intent to murder. We conclude that such an inference is not supportable under the facts of this case." *Id.*

<sup>40</sup> See *id.* at 516.

Before an intent to kill may be inferred based solely upon the defendant's exposure of a victim to a risk of death, it must be shown that the victim's death would have been a natural and probable result of the defendant's conduct. . . . Death by AIDS is clearly one natural possible consequence of exposing someone to a risk of HIV infection, even on a single occasion. It is less clear that death by AIDS from that single exposure is a sufficiently probable result to provide the sole support for an inference that the

ultimately held that the risk of exposure was not sufficient to infer the defendant's intent to kill the victim.<sup>41</sup>

Legal analysts described the decision as an important ruling in AIDS law.<sup>42</sup> The decision countered the prevailing trend of finding defendants guilty in knowing transmission cases tried under traditional criminal laws.<sup>43</sup> The decision was considered controversial<sup>44</sup> and sparked considerable debate over the court's rationale.<sup>45</sup>

Other state jurisdictions have supported prosecutions where additional evidence was present, such as statements relevant to the intent of the defendant.<sup>46</sup> Such additional evidence, however, is often not available. The *Smallwood* case was followed by the passage of many HIV-specific criminal statutes throughout the country.<sup>47</sup>

person causing the exposure intended to kill the person who was exposed.  
*Id.*

<sup>41</sup> See *id.* (holding that "we find no additional evidence from which to infer an intent to kill").

<sup>42</sup> See Amy Argetsinger, *Maryland's Top Court Says HIV Not Enough To Convict Rapist of Attempted Murder*, WASH. POST, Aug. 2, 1996, at A1. Arthur Leonard, a professor at New York Law School, stated that "This will be an important decision for AIDS law." *Id.* at A1. Georgetown Law Professor Lawrence O. Gostin summarized the ruling as supportive of equal treatment of HIV-positive criminals. *Id.* at A1.

<sup>43</sup> See *id.* At the time of the *Smallwood* decision, at least one dozen cases were upheld by appeals courts in the country, where HIV-positive individuals had been found guilty of attempted murder for the potential of exposing others to the virus. *Id.*

<sup>44</sup> See, e.g., Schaffner, *supra* note 30, at 400 (stating that "[h]olding Smallwood accountable for his actions would have meant that AIDS rapists who are aware of their HIV-positive status and understand that rape can lead to transmission of the virus to their victims will be convicted of attempted murder . . .").

<sup>45</sup> See Argetsinger, *supra* note 42, at A1. Proponents of the *Smallwood* decision, such as Catherine Hanssens, a director with the gay rights Lambda Legal Defense and Education Fund, "argued that as awful as the rapes were, they should not be judged differently because of the accused's health. *Id.* 'HIV alone is not evidence of criminal intent. . . . It's not a sufficient basis to treat two identically horrible crimes differently under the law.'" *Id.* While opponents, such as the Maryland State Attorney General J. Joseph Curran Jr., whose office prosecuted the case, criticized the ruling as letting a guilty man go free on a technicality. *Id.* See also Grishkin, *supra* note 23, at 1618. "The *Smallwood* decision has sparked an intense debate. Proponents . . . have applauded it as 'standing for the proposition that persons with AIDS should be treated like everyone else in the criminal justice system . . . [while opponents] accuse the *Smallwood* court of exalting legal technicalities over justice . . ." *Id.*

<sup>46</sup> See, e.g., *State v. Haines*, 545 N.E.2d 834, 838 (Ind. Ct. App. 1989) (holding that it was only necessary for state to show that defendant did all he believed necessary to bring about intended result); *State v. Smith*, 621 A.2d 493, 511 (N.J. Supr. Ct. App. Div. 1993) (holding attempted murder conviction appropriate when defendant believes he can cause death by biting his victim).

<sup>47</sup> See Richardson, *supra* note 4, at A1 (noting recent explosion of passage of HIV-specific knowing transmission statutes).

### B. Problems in Proving Causation

The element of causation has proven to be another difficult challenge for prosecutors trying to pursue knowing transmission cases under traditional criminal laws.<sup>48</sup> In knowing transmission cases the element of causation is often tied to the element of intent.<sup>49</sup> Prosecutors must prove that the victim's exposure to the HIV virus resulted from actions of the defendant<sup>50</sup> and not a third party.<sup>51</sup>

In order to establish causation the likelihood of infection becomes a probative issue in knowing transmission prosecutions. Early attempts to prosecute knowing transmission cases were often met with little success because of the lack of medical evidence regarding possible ways of transmitting the virus.<sup>52</sup> Despite the heavy burden a prosecutor faces in proving intent and causation, they are often benefited by the fact that the impossibility of transmission is not a defense to an "attempt"

<sup>48</sup> See Heather J. Blum, *Tort Liability as the Result of the Transmission of HIV Through Artificial Insemination by Donor*, 4 ALB. L.J. SCI. & TECH. 333, 349 (1994) (noting difficulties in proving causation in knowing transmission cases because "HIV may be transmitted in a number of ways"); Colloquy, *supra* note 1, at 928 (noting "[t]he government must prove beyond a reasonable doubt that the defendant's actions caused the death" and "[i]f the victim has had multiple sexual partners, the government is going to have a difficult time meeting its burden of proof"); Decker, *supra* note 9, at 360 (noting inherent difficulties proving causation in knowing transmission cases under traditional criminal statutes); Strader, *supra* note 20, at 437 (stating "the government may have difficulty proving causation, i.e., that the victim's only exposure to HIV resulted from the defendant's acts").

<sup>49</sup> PAUL DEROHANNESIAN II, *SEXUAL ASSAULT TRIALS: VOLUME I* 527 (Lexis Law Publishing 1998) (stating that "[t]he issue of causation is tied to the element of intent . . .").

<sup>50</sup> See Strader, *supra* note 20, at 437 (discussing difficulties prosecutors may face in proving causation). See generally Grishkin, *supra* note 23, at 1621 (noting particular difficulties prosecution may face in some knowing transmission cases); Harris, *supra* note 31, at 240-41 (discussing difficulties prosecuting knowing transmission cases with respect to causation); Heth, *supra* note 31, at 855 (noting difficulties involved in proving causation).

<sup>51</sup> See O'Toole, *supra* note 2, at 188 (noting difficulty prosecutors face in attempting to prove that particular defendant was one who infected victim); Ruby, *supra* note 30, at 327 (noting that prosecutors must prove that "victim contracted the disease from the actions of the defendant, and not from any other source").

<sup>52</sup> See Robert O. Boorstinc, *Criminal and Civil Litigation on Spread of AIDS Appears*, N.Y. TIMES, June 19, 1987, at A1 (reporting case in New York where assault charges in knowing transmission case were dropped because of "the difficulty of finding positive medical evidence of transmission," and of case in Michigan where attempted murder charges were thrown out in knowing transmission case because of lack of evidence of transmitting virus through saliva); Donald E. Walther, *Taming a Phoenix: The Year-and-a-Day Rule in Federal Prosecutions for Murder*, 59 U. CHI. L. REV. 1337, 1351 (1992) (noting cases where charges have been dropped in knowing transmission cases because of lack of medical evidence showing how HIV can be transmitted).

crime.<sup>53</sup> In some states, for instance, as long as the defendant had the requisite mental state, whether or not the activity actually transferred the virus to the victim is irrelevant.<sup>54</sup>

In cases where the prosecution must make a showing that transmission was possible,<sup>55</sup> a remote possibility of transmission has been held sufficient. In *Weeks v. State*,<sup>56</sup> the Texas Court of Appeals affirmed a conviction for attempted murder after the defendant spit on a prison guard.<sup>57</sup> At the time of the offense, Weeks had tested positive for the HIV virus.<sup>58</sup>

In the *Weeks* case, a number of qualified HIV experts<sup>59</sup> testified during the trial and disagreed over the possibility of transmitting HIV through saliva.<sup>60</sup> The state's experts even

<sup>53</sup> See MODEL PENAL CODE § 5.01, cmt. 3(b) (Official Draft and Revised Comments 1985) (rejecting impossibility defense in most circumstances).

<sup>54</sup> See, e.g., *State v. Haines*, 545 N.E.2d 834, 839 (Ind. Ct. App. 1989) (stating "[i]t was only necessary for the State to show that Haines did all that he believed necessary to bring about an intended result, regardless of what was actually possible"); *Zickefoose v. State*, 270 Ind. 618, 623 (Ind. Ct. App. 1979) (affirming attempted murder conviction where defendant did all that he believed necessary to cause death); *People v. Davis*, 72 N.Y.2d 32, 37 (N.Y. 1988) (holding that legal impossibility does not negate intent element for attempted or intentional acts).

<sup>55</sup> See Gostin, *supra* note 7, at 1044 (citing statistics that in cases where sexual intercourse was mode of transmission, likelihood of transmission based on one encounter is relatively low – estimated at 1/1,000 or 1/10,000 if condom is used).

<sup>56</sup> 834 S.W.2d 559 (Tex. Ct. App. 1992).

<sup>57</sup> See *id.* at 560. The statute under which Weeks was convicted states: "A person commits an offense if, with specific intent to commit an offense, he does the act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended." TEX. PENAL CODE § 15.01(a). *Id.*

<sup>58</sup> See *id.* (noting that "[a]t the time of the offense, appellant had tested positive for the human immunodeficiency virus (HIV), the virus which causes acquired immune deficiency syndrome (AIDS)").

<sup>59</sup> See *id.* at 562. Four qualified experts on HIV testified at the trial. *Id.* Mark E. Dowell, M.D. a doctor of infectious diseases at Baylor College of Medicine; Paul Drummond Cameron, Ph.D., Chairman of the Family Research Institute; and Lorraine Day, M.D., an orthopedic surgeon at the University of California at San Francisco and Chief of the Orthopedic Department at San Francisco General Hospital, were called to testify for the State. *Id.* Dr. Richard B. Pollard, Professor of Internal Medicine and Microbiology at the University of Texas Medical Branch at Galveston and Director of the Diagnostic Virology Laboratory at the University of Texas, testified on behalf of Curtis Weeks. *Id.*

<sup>60</sup> See *id.* at 562 n.2. (noting that "[m]any of the AIDS experts express the opinion that it is impossible to transmit HIV through saliva"); see also Wayne R. Coyne, *An Economic Analysis Of The Issues Surrounding AIDS In The Long Run, The Path of Truth and Reason Cannot Be Diverted*, 41 AM. U. L. REV. 1199, 1207 (1992) (stating that most scientists believe transmission of HIV through saliva is nonexistent); Gostin, *supra* note 7, at 1023-25 (noting "there has never been a documented case of transmission by saliva, despite close observation and follow-up investigations of cases of biting, spitting, deep kissing, and intimate caring activities"); Alan R. Lifson, *Do Alternative Modes for Transmission of Human Immunodeficiency Virus Exist? A Review*, 259 J. AM. MED. ASSOC. 1353, 1354 (1988) (noting that given present data, risk of transmitting HIV through saliva is still only "theoretical" or "negligible"). But see John T. Wolohan, *An*

agreed that the possibility of transmission through saliva was small.<sup>61</sup> An amici curiae brief, jointly filed by The American Civil Liberties Union, the Dallas Gay Alliance, the Texas Human Rights Foundation, and the Greater Houston American Civil Liberties Union,<sup>62</sup> urged the Court of Appeals to take judicial notice<sup>63</sup> "that it is impossible to transmit the virus which causes AIDS by spitting."<sup>64</sup> The court refused, noting that such a statement had never been conclusively proven.<sup>65</sup>

Proving causation becomes particularly troublesome when prosecuting knowing transmission cases under traditional assault statutes.<sup>66</sup> Under many states' assault statutes,<sup>67</sup> it is

*Ethical And Legal Dilemma: Participation In Sports By HIV Infected Athletes*, 7 MARQ. SPORTS L. J. 373, 397 n.31 (finding evidence that shows that contact with saliva results in transmission of HIV).

<sup>61</sup> See *Weeks v. State*, 834 S.W.2d 559, 562 (Tex. Ct. App. 1992). Mark E. Dowell, M.D., one of the three HIV experts that testified for the State stated that "the possibility [of transmission through saliva] is low but certainly not zero." *Id.* Dr. Dowell added that the possibility would increase if there was blood in the saliva or if the saliva went up the victim's nose or got on his or her lips. *Id.* But see Gerald H. Friedland & Robert S. Klein, *Transmission of the Human Immunodeficiency Virus*, 317 NEW ENG. J. MED. 1125, 1133 (Oct. 29, 1987).

The accumulated data strongly support the conclusion that transmission of HIV occurs only through blood, sexual activity, and perinatal events. Nevertheless, the fear of transmission by other routes may continue to increase with the anticipated increase in the number of cases of AIDS over the next few years. An unrealistic requirement for absolute certainty about the lack of transmission by other routes persists, despite the knowledge that it is not scientifically possible to prove that an event cannot occur.

*Id.*

<sup>62</sup> See *Weeks*, 834 S.W.2d at 562 n.2.

<sup>63</sup> See *id.* at 562 n.2, citing TEX. R. CRIM. EVID. § 201(b). § 201(b) states: "A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Id.*

<sup>64</sup> See *Weeks*, 834 S.W.2d at 562 n.2.

<sup>65</sup> See *id.* (noting that it has "not been conclusively established [that it is impossible to transmit HIV through saliva] and is not free from reasonable dispute. Accordingly, this court can not take judicial notice of the matter urged.").

<sup>66</sup> See DEROHANNESIAN II, *supra* note 49, at 526 (noting that causation can be "major issue" in prosecuting knowing transmission cases under many assault statutes). But *c.f.* *United States v. Joseph*, 33 M.J. 960, 962-63 (C.M.A. 1991) (convicting defendant of aggravated assault for having sexual intercourse with woman while knowing he was HIV-positive).

<sup>67</sup> See N.Y. PENAL LAW § 120.10 (McKinney 1996). New York's statute for first degree assault provides:

A person is guilty of assault in the first degree when:

1. With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument; or

...

3. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby

often required that the defendant's act be likely to produce "great bodily injury," "serious physical injury," or some similar level of injury.<sup>68</sup> The causation element opens traditional assault statutes to attack by defendants who argue that their "acts" did not cause "great bodily injury" or "serious physical injury."

One California appellate court set aside a defendant's conviction based upon information that there was no "rational" basis for 'assuming the possibility' that petitioner's act was 'likely to produce great bodily injury.'<sup>69</sup> In *Guevara v. Superior Court*,<sup>70</sup> the defendant was arrested for having unprotected consensual intercourse with a minor without disclosing his HIV-positive status.<sup>71</sup> The California appellate court examined the likelihood that the defendant's acts would result in the transmission of HIV<sup>72</sup> and concluded that there was no evidence to support the charge that his bodily fluids "were likely to infect the minor with HIV."<sup>73</sup> As the court in *Guevara* demonstrated, unless the victim is actually infected by the defendant, issues of causation can prove troublesome in attempting to prosecute knowing transmission cases under traditional criminal laws.

### III. HIV-SPECIFIC CRIMINALIZATION STATUTES FOR THE KNOWING

causes serious physical injury to another person; or

*Id.*

<sup>68</sup> See DEROHANNESIAN II, *supra* note 49, at 526 (stating that many assault statutes require "the element that the act would be likely to produce 'great bodily injury,' 'serious physical injury,' or similar level of injury").

<sup>69</sup> See *Guevara v. Superior Court*, 62 Cal. App. 4th 864, 870 (Cal. App. 6th 1998) (holding that "[t]he record discloses no such 'rational' basis for the magistrate's implicit assumption").

<sup>70</sup> See *id.*

<sup>71</sup> See *id.*

<sup>72</sup> See *id.* at 869-70. The court cites two studies showing that infection rates through sexual intercourse are relatively low. *Id.* Niclosi et al., *The Efficiency of Male-To-Female and Female-To-Male Sexual Transmission of Human Immunodeficiency Virus: A Study of 730 Stable Couples*, 5 EPIDEMIOLOGY 570, 572-73 (1994). In this study of over 200 uninfected female partners of infected males, less than 10 percent of the women became infected during the four-year study period. *Id.*; Saracco et al., *Man-To-Woman Sexual Transmission of HIV: Longitudinal Study of 343 Steady Partners of Infected Men*, 6 J. ACQUIRED IMMUNE DEFICIENCY SYNDROMES 497, 500 (1993). This study states that the annual infection rate for female partners of unprotected infected males was 5.7 percent. *Id.* See generally Norman Hearst & Stephanie B. Hulley, *Preventing the Heterosexual Spread of AIDS: Are We Giving Our Patients the Best Advice?*, 259 J. AM. MED. ASSOC. 2428, 2429 (1988). The authors note a number of estimates regarding male-to-female infection rates. *Id.*

<sup>73</sup> *Guevara*, 62 Cal. App. at 869.

## TRANSMISSION OF HIV

Current statistics show that the HIV-AIDS epidemic continues to grow at an alarming rate.<sup>74</sup> Presently, New York State does not have a statute that specifically targets the knowing transmission of the HIV virus.<sup>75</sup> In the aftermath of the case against Nushawn Williams, over 60 HIV-related bills have been introduced in the New York State Legislature.<sup>76</sup> Two legislative proposals are currently being debated in both the New York State Senate<sup>77</sup> and Assembly<sup>78</sup> that would permit prosecutors to charge individuals with knowingly transmitting the HIV virus.

As drafted, the Senate<sup>79</sup> and Assembly<sup>80</sup> versions of the bill would amend the penal law by adding two new sections. These two new sections would be called: reckless endangerment of the public health in the first degree and reckless endangerment of the public health in the second degree.<sup>81</sup> Such an offense, if

<sup>74</sup> See *San Francisco AIDS Foundation: About AIDS* (last modified Dec. 31, 1998) <<<http://www.sfaf.org/aboutaids/statistics/>>>. It is estimated that there are between 650,000-900,000 HIV-positive individuals in the United States. *Id.* As of December 31, 1998, there has been a total of 641,086 reported AIDS cases in this country alone. *Id.* Approximately one in every 300 Americans is estimated to be HIV-positive. *Id.* Additionally, it is estimated that there are at least 40,000 new infections per year. *Id.* Statistics from: Centers for Disease Control and Prevention, HIV/AIDS Surveillance Report, Cases Reported through December 1997; see also SURGEON GENERAL'S REPORT TO THE AMERICAN PUBLIC ON HIV INFECTION AND AIDS, 1 (1993), reprinted in Gabel, *supra* note 18, at 981. AIDS has now become the third leading cause of death among men and women between the ages of twenty-five and forty-four in this country. *Id.*

<sup>75</sup> See Hansen, *supra* note 10, at 26 (noting that "New York state has no law specifically targeting transmission of the virus that causes AIDS. . .").

<sup>76</sup> See Lynda Richardson, *Man Faces Felony Charge of Exposing Girl to HIV*, N.Y. TIMES, Aug. 20, 1998, at B3 (noting that in 1998, about 60 HIV-related bills were introduced before legislature). See, e.g., NY S.B. 6076, 221st Leg., 1st Spec. Sess. (N.Y. 1997)(attempting to amend penal law by adding new section 125.11 of criminally negligent homicide by person with HIV); NY A.B. 9434, 221st Leg., 1st Spec. Sess. (N.Y. 1997)(attempting to amend penal law section 125.25, by adding knowing transmission as crime of murder in second degree).

<sup>77</sup> See S.B. 3017, *supra* note 8.

<sup>78</sup> See A.B. 5501, *supra* note 8.

<sup>79</sup> See S.B. 3017, *supra* note 8.

<sup>80</sup> See A.B. 5501, *supra* note 8.

<sup>81</sup> See N.Y. PENAL LAW § 15.05(3). § 15.05(3) defines the level of culpability necessary with respect to a crime where the required culpability is recklessness:

A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation . . .

*Id.*



committed in the first degree, would constitute a class B felony, and if in the second degree, a class C felony.<sup>82</sup> Both proposals require that the defendant be "aware" that he or she is HIV-positive when engaging in the prohibited conduct.<sup>83</sup>

Additionally, the Senate<sup>84</sup> and Assembly<sup>85</sup> bills would amend the criminal procedure law and require the testing of any individual arrested for violating the knowing transmission statute.<sup>86</sup> The statute provides that the results of these tests be made available to the victim upon request.<sup>87</sup> Courts in New York State have held, in other criminal proceedings, that the results of court-ordered blood tests could be disclosed to the district attorney's office for criminal adjudication.<sup>88</sup>

Amidst growing concerns surrounding the intentional transmission of HIV, states across the country have passed laws designed to protect the public from the spread of HIV-AIDS.<sup>89</sup> Presently, over one-half of the states have criminalized the knowing transmission or exposure of another to the HIV virus.<sup>90</sup> In addition to state legislation, a recent proposal in Congress, the

<sup>82</sup> See S.B. 3017, *supra* note 8; A.B. 5501, *supra* note 8.

<sup>83</sup> See S.B. 3017, *supra* note 8; A.B. 5501, *supra* note 8.

<sup>84</sup> See S.B. 3017, *supra* note 8.

<sup>85</sup> See A.B. 5501, *supra* note 8.

<sup>86</sup> See S.B. 3017, *supra* note 8; A.B. 5501, *supra* note 8. Each proposal would amend the criminal procedure law as follows:

Section 160.46 HIV [Related Testing Of Alleged Sex And Public Health Offenders]

1. A police officer who makes an arrest for any crime set forth in . . . Section 120.26 . . . of the penal law . . . shall following such arrest . . . cause such defendant to be immediately given an HIV related test to determine if such defendant has HIV infection, HIV related illness or AIDS.

...

3. The result of an HIV related test performed pursuant to subdivision one of this section, shall, upon request, be made available to the victim or alleged victim of such crime and to the defendant.

*Id.*

*Cf.* Fla. Stat. Ann. § 775.0877 (1) (West 1995). The Florida statute bars the state from using the results of the test in a prosecution in which the test was ordered for. *Id.*

<sup>87</sup> See S.B. 3017, *supra* note 8; A.B. 5501, *supra* note 8.

<sup>88</sup> See *In the Matter of Abe A.*, 56 N.Y.2d 288, 291 (N.Y. 1982) (holding that suspect in criminal investigation may be required by court order to give sample of blood for scientific analysis); *People v. Anonymous*, 153 Misc. 2d 436, 438 (Monroe Cty. Ct. 1992) (holding disclosure of HIV test results to court was necessary because of "clear and imminent danger" to health of those who might come in contact with defendant).

<sup>89</sup> See Hansen, *supra* note 10, at 26 (discussing growth of knowing transmission statutes); Richardson, *supra* note 4, at A1 (discussing number of states adopting knowing transmission statutes).

<sup>90</sup> See Richardson, *supra* note 4, at A1 (noting that over 30 states had some form of statute criminalizing knowing transmission of HIV).

"HIV Prevention Act of 1997,"<sup>91</sup> would incorporate many of the provisions already enacted by the states.<sup>92</sup> Both the House<sup>93</sup> and Senate<sup>94</sup> versions of the act would require case reporting<sup>95</sup> and notification to those who may have been exposed to the virus.<sup>96</sup> The proposals also state Congressional desire for states to have their own HIV-specific knowing transmission statutes in effect.<sup>97</sup>

Legislation aimed at restricting the actions of HIV-positive individuals reflects an overall trend in the criminal justice system's response to the HIV-AIDS crisis. Legislative goals have shifted the focus from protecting the civil liberties of HIV-positive individuals to prosecuting those who attempt to knowingly transmit the virus.<sup>98</sup> AIDS activists argue that HIV-specific criminalization statutes, similar to the ones currently being debated in New York<sup>99</sup> and Congress,<sup>100</sup> are an attempt to politicize a public health issue.<sup>101</sup> These activists contend that

<sup>91</sup> See HIV Prevention Act of 1997, H.R. 1062, 105th Cong. (1997); HIV Prevention Act of 1997, S. 503, 105th Cong. (1997).

<sup>92</sup> See H.R. 1062, *supra* note 91. The House version, with 111 Cosponsors (3 Democrats and 108 Republicans) would amend title XIX of the Social Security Act in order to help prevent the transmission of the HIV virus. *Id.*; see also S. 503, *supra* note 91. The Senate version, with 5 Cosponsors (all Republicans) is offered as a bill to prevent the transmission of HIV. *Id.* Both versions have yet to make it through a legislative session; see also Hansen, *supra* note 10, at 26. The author explains that three categories of legislation adopted by states would be incorporated into federal legislation: case reporting, partner notification, and increased penalties for HIV-positive persons who knowingly infect others without disclosing their HIV status. *Id.*

<sup>93</sup> See H.R. 1062, *supra* note 91.

<sup>94</sup> See S. 503, *supra* note 91.

<sup>95</sup> See H.R. 1062, *supra* note 91, at § 3; S. 503, *supra* note 91, at § 3. Both the House and Senate versions provide: "The State requires that, in the case of a health professional or other entity that provides for the performance of a test for HIV on an individual, the entity confidentially report positive test results to the State public health officer . . ." *Id.*

<sup>96</sup> See H.R. 1062, *supra* note 91, at § 3; S. 503, *supra* note 91, at § 3. Both the House and Senate versions provide: "The State requires that the public health officer of the State carry out a program of partner notification to inform individuals that the individuals may have been exposed to HIV." *Id.*

<sup>97</sup> See H.R. 1062, *supra* note 91, at § 4; S. 503, *supra* note 91, at § 4. Both the House and Senate versions provide: "It is the sense of the Congress that the States should have in effect laws providing that, in the case of an individual who knows that he or she has HIV disease, it is a felony for the individual to infect another with HIV if the individual engages in the behaviors involved with the intent of so infecting the other individual." *Id.*

<sup>98</sup> See Richardson, *supra* note 4, at A1 (stating that focus is now on public welfare); Argetsinger, *supra* note 42, at (noting Georgetown University Law professor Lawrence Gostin's statement that trend of AIDS cases in 1990s "is to be quite punitive against persons with AIDS").

<sup>99</sup> See S.B. 3017, *supra* note 8; A.B. 5501, *supra* note 8.

<sup>100</sup> See H.R. 1062, *supra* note 92; S. 503, *supra* note 92.

<sup>101</sup> See Hansen, *supra* note 10, at 26. The author notes claims by AIDS activists' that while 27 states have increased the penalties for HIV-infected persons, those penalties are not usually enforced. *Id.* See generally Gabel, *supra* note 18, at 982. The author argues

such statutes are merely symptomatic of a public misconception about the virus<sup>102</sup> and "reflect[s] a misguided and politically motivated eagerness to be seen as doing something to combat the spread of AIDS."<sup>103</sup>

Critics of HIV-specific criminal statutes also argue that education is the most important tool in curtailing the spread of the HIV virus.<sup>104</sup> While these statutes will arguably make it easier to prosecute individuals like Nushawn Williams,<sup>105</sup> critics

that "[t]he purpose of this Comment is to assess those recalcitrant cases and the associated charges under which [these knowing transmission] convictions occur. The dignity of individuals who are HIV-positive or suffering from AIDS should not be maligned by the actions of a few who exceed the normal parameters of human decency." *Id.*

<sup>102</sup> See Richardson, *supra* note 76, at B4. Opponents cite recent statistics that state in 1997, 55% of Americans believed that they could become infected by sharing a drinking glass with an infected person, compared with 48% in 1991. *Id.* Additionally, 41% believed that AIDS could be contracted from a public toilet, compared with 34% in 1991. *Id.* See also Lee Sanchez, Stephanie Wilson, Lisa Speissegger & Amanda Watson, *Criminal Transmission and Exposure* (July 19, 1999) <<<http://stateserv.hpts.org/public/issueeb.n.>>>. The authors note a 1997 poll showing that 79% of Americans believe that an individual who knowingly infects another with HIV should face murder charges. *Id.*

<sup>103</sup> See Boorstinc, *supra* note 52 (reporting that public health specialists and gay rights advocates argue that "politicians have seized on a handful of peculiar and frivolous cases and have often relied on faulty medical assumptions to justify their call for legislation."); see also Gostin, *supra* note 7, at 1043 (arguing that many prosecutions of knowing transmission cases "reflect either a politically motivated eagerness to be seen to be combating [sic] AIDS or a misunderstanding of how it is transmitted"); Ruby, *supra* note 30, at 318 (noting argument by critics that knowing transmission statutes are politically motivated); Strader, *supra* note 20, at 438 (noting argument that politics has played important role in recent passage of HIV transmission statutes); see generally Scott A. McCabe, *The Maryland Survey: 1995-1996: Recent Decisions: The Maryland Court of Appeals*, 56 MD. L. REV. 762, 775 (1997) (arguing that prosecuting knowing transmission of AIDS is not best way to safeguard public health).

<sup>104</sup> See Richard T. Andrias, *Urban Criminal Justice: Has the Response to the HIV Epidemic Been "Fair"?*, 20 FORDHAM URB. L.J. 497, 506 (1993) (stating consensus that best way of combating AIDS epidemic "is to stress education, voluntary testing and counseling"); Martha A. Field & Kathleen M. Sullivan, *AIDS and the Criminal Law*, 15 LAW, MED. & HEALTH CARE 46, 47 (1987) (arguing that "public education about AIDS prevention is a far preferable means of influencing behavior"); Gabel, *supra* note 18, at 987 (noting importance of educating individuals regarding "abstinence, monogamy and the proper use of condoms."); Lawrence O. Gostin, *The Future of Public Health Law*, 12 AM. J.L. & MED. 461, 464 (1986) (advocating educating those in high risk groups about transmission dangers); see also UNITED STATES CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, HOW EFFECTIVE IS AIDS EDUCATION? 1 (June 1988) (noting that public officials stress education as primary means to helping stop spread of AIDS by high-risk individuals).

<sup>105</sup> See Colloquy, *supra* note 1, at 936 (arguing that HIV-specific statutes provide opportunities for successful state prosecutions "without all the problems that are raised by traditional offenses that have specific intent or purpose requirements and that require establishing causation"); Mona Markus, *A Treatment for the Disease: Criminal HIV Transmission/Exposure Laws*, 23 NOVA L. REV. 847, 850 (1999) (stating that HIV-specific criminalization statutes are "far more effective" than traditional criminal laws in prosecuting knowing transmission cases). *But see* Ruby, *supra* note 30, at 325 (arguing that use of existing criminal statutes is more effective in prosecuting knowing

contend that such laws will ultimately have detrimental effects on the fight against the virus.<sup>106</sup> It is argued that those who are infected will be less likely to go for tests<sup>107</sup> and less willing to get treatment.<sup>108</sup> In response, proponents of federal legislation aimed at criminalizing the knowing transmission of HIV argue that the threat from HIV-AIDS has reached such epidemic proportions that it must be treated as a significant threat to public health.<sup>109</sup>

transmission cases).

<sup>106</sup> See McCabe, *supra* note 103, at 775 (arguing that passage of knowing transmission statutes would be "expensive, ineffective, and counterproductive").

<sup>107</sup> See, e.g., Renee Cordes, *Prosecuting HIV Cases – Solution of Problem?*, 28 TRIAL 92, 92-93 (Feb. 1992) (noting that according to director of U.S. AIDS Litigation Project at U.S. Public Health Service, Lawrence Gostin, criminal prosecutions may "discourage people from having the appropriate tests to determine whether or not they test HIV-positive . . . if it's a felony to have sex knowing you're infected, then you simply won't want to know you're infected"); O'Toole, *supra* note 2, at 201 (noting that knowing transmission statutes, and forced disclosure of testing that many of these statutes require, "could discourage testing and ultimately even prove to be counter-productive in containing the spread of HIV"); Hansen, *supra* note 10, at 28 (citing director of ACLU's AIDS project Matt Coles' statement that research shows that many people have claimed they will not undergo testing for AIDS if legislation that requires reporting also requires the names of HIV-infected persons to be sent to the government); David Sharrock, *Clarke Rejects Law on AIDS Transmission*, THE GUARDIAN, December 16, 1992, at 2 (noting that HIV-specific statutes may lead to decrease in AIDS testing).

<sup>108</sup> See, e.g., Scott Burris, *Law and the Social Risk of Health Care: Lessons from HIV Testing*, 61 ALB. L. REV. 831, 841 (1998) (stating that U.S. response to AIDS epidemic led to conclusion that "an appropriate legal response to HIV-AIDS will most often have as its desired outcome the absence, rather than the presence of applicable law"); David, *supra* note 30, at 260 (1995) (noting that some public health officials are concerned that prosecuting knowing transmission cases may "be counter-productive to public health initiatives"); Lawrence O. Gostin, *Public Health Strategies for Confronting AIDS*, 261 J. AM. MED. ASSOC. 1621, 1629 (1989) (stating that such legislation proceeds despite lack of evidence of its effectiveness and contradicts numerous health officials' advice); Lawrence O. Gostin, *The Case Against Compulsory Casefinding in Controlling AIDS*, 12 AM. J. L. MED. 7, 24 (1987) (claiming involuntary, highly restrictive measures may deter cooperation with health officials and programs, and that there is no direct correlation between intrusiveness of legislation and effectiveness of laws).

<sup>109</sup> See Hansen, *supra* note 10, at 26 (quoting Representative Tom Coburn, practicing family doctor and chief sponsor of HIV-partner notification bill, "it's time to stop treating AIDS like a civil rights issue and start treating it like the public health crisis that it is"); Richardson, *supra* note 4, at A1 (noting that Representative Gary L. Ackerman, co-sponsor of Federal HIV-partner notification bill with Representative Tom Coburn, argued that "we have to get over the hurdle of treating AIDS as if it were a political disease rather than a public health disease"); see also *HIV Transmission: Hearing on the Health & Environment Subcommittee of the House Commerce Committee*, 105th Cong. 1062 (1998) (statement of Charlie Norwood, Representative, Georgia) (stating that "HIV is a public health problem first. And secondly, a civil rights issue"); *HIV Transmission: Hearing on the Health & Environment Subcommittee of the House Commerce Committee*, 105th Cong. 1062 (1998) (statement of Robert Berke, M.D., Commissioner of Public Health, Chautauqua County Health Department) (stating that while HIV needs to be treated as communicable disease "[i]t suffices to say that there is a clear and present danger that the public health efforts to control HIV may be put at some risk if there is a perceived close connection between the public health and criminal action efforts").

#### IV. CONSTITUTIONAL CHALLENGES TO THE PROSECUTION OF KNOWING TRANSMISSION CASES

Knowing transmission statutes have been challenged on various constitutional grounds. Most frequently, challengers have argued that such statutes are either unconstitutionally vague<sup>110</sup> or overbroad.<sup>111</sup> In order to minimize the number of constitutional challenges to knowing transmission statutes states should specifically define what behavior falls within its statutory provisions and set forth examples of actions subject to criminal prosecution.<sup>112</sup>

The United States Supreme Court has held that laws must be sufficiently defined to: (1) give those of ordinary intelligence reasonable opportunity to know what is being prohibited; and (2) provide explicit standards to those who are to apply these laws.<sup>113</sup> In challenging knowing transmission statutes, opponents

<sup>110</sup> See *People v. Russell*, 158 Ill.2d 23, 27 (Ill. 1994) (finding an HIV-specific criminal statute to be "sufficiently clear and explicit so that a person of ordinary intelligence need not have to guess at its meaning or application"); *People v. Dempsey*, 242 Ill. App.3d 568, 591 (Ill. App. Ct. 1993) (explaining that in order to successfully challenge statute as unconstitutionally vague, it must be vague as applied to defendant's conduct); *State v. Gamberella*, 633 So.2d 595, 601-03 (La. App. 1993) (dismissing various vagueness arguments posed by defendant); *State v. Stark*, 832 P.2d 109, 115 (Wash. Ct. App. 1992) (indicating that since HIV-specific criminal statute does not involve any First Amendment rights, defendant may only argue that it is vague as applied to him).

<sup>111</sup> See *People v. Jensen*, 231 Mich. App. 439, 442 (1998) (holding that defendant's challenge of Michigan's knowing transmission statute as overbroad failed).

<sup>112</sup> See REPORT, *supra* note 1, at 131. In 1987, a Presidential Commission was established to investigate the spread of the HIV-AIDS virus in the United States. *Id.* The Commission recommended that "[a]doption by the states of a criminal statute—directed to those HIV-infected individuals who know of their status and engage in behaviors which they know are, according to scientific research, likely to result in transmission of HIV—[should] clearly set forth those specific behaviors subject to criminal sanctions." *Id.*; see also O'Toole, *supra* note 2, at 192. The author notes that in response to the Presidential Commission "many of the states have meticulously and effectively defined exactly what behavior is encompassed by the terms used in their HIV-specific crime statutes. *But see* S.B. 3017, *supra* note 8; A.B. 5501, *supra* note 8.

<sup>113</sup> See *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). The Supreme Court upheld the unconstitutionality of "vague" statutes because such statutes deprived defendant of his or her due process rights. Justice Marshall stated:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates the basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

have argued that the statutes are so vague or overbroad that they could prohibit conduct that is unable or unlikely to transmit the HIV virus.<sup>114</sup> Critics contend that this vagueness and overbreadth is a result of the legislature's dissatisfaction with attempts to prosecute knowing transmission cases under traditional criminal laws.<sup>115</sup> Despite criticism, many states' highest courts have upheld knowing transmission statutes against constitutional challenges.<sup>116</sup>

For example, a trial court in Illinois struck down the states' knowing transmission statute as unconstitutionally vague.<sup>117</sup> Two years later, however, Illinois' highest court upheld the statute as constitutional in *People v. Russell*.<sup>118</sup> Russell challenged the Illinois statute, which prohibited the knowing transmission of HIV to another through "intimate contact."<sup>119</sup> Russell argued that the statute was "so vague as to deny the defendants due process of law."<sup>120</sup> The Illinois Supreme Court found that the defendants brief failed to show how the Illinois statute violated either the federal or state constitution.<sup>121</sup> Instead, the court held the statute was "sufficiently clear and

*Id.*

<sup>114</sup> See, e.g., IDAHO CODE § 39-608 (Supp. 1991) (prohibiting transfer or attempt to transfer any bodily fluid, including saliva); ILL. ANN. STAT. ch. 720 § 5/12-16.2 (Smith-Hurd Supp. 1993) (prohibiting exposure of bodily fluid of one to another in manner that could result in infection); MONT. CODE ANN. § 50-18-112 (1989) (proscribing knowingly exposing another to infection, but not providing any definitional terms); WASH. REV. CODE ANN. § 9A.36.021 (West Supp. 1991) (providing that it is illegal to administer or cause HIV to be taken by another person); see also Leech, *supra* note 35, at 687 (noting that individuals have been convicted for conduct that did not transmit HIV).

<sup>115</sup> See Colloquy, *supra* note 1, at 941 (noting that HIV-specific statutes are in response to "dissatisfaction" with attempting to fit knowing transmission prosecutions under traditional criminal laws).

<sup>116</sup> See *People v. Russell*, 158 Ill.2d 23, 25 (Ill. 1994) (reversing two lower court decisions that declared state's criminal transmission of HIV statute to be unconstitutionally vague); *State v. Gamberella*, 633 So.2d 595, 602 (La. App. 1993) (upholding state's statute criminalizing intentional exposure of AIDS virus against claims that intent element of statute was "uncertain" and exposure element "unclear"); *People v. Jensen*, 231 Mich. App. 439, 442 (Mich. Ct. App. 1998) (upholding constitutionality of Michigan's knowing transmission statute).

<sup>117</sup> See *People v. Russell*, No. 91-CF-1304 (St. Clair Co. April 9, 1992) (charging defendant with engaging in consensual sexual intercourse without notifying her partner of her HIV-positive status); *People v. Lunsford*, No. 92-CF-147 (Coles Co. Oct. 9, 1992) (charging defendant with raping woman knowing that he was HIV-positive).

<sup>118</sup> 158 Ill.2d 23, 25-26 (Ill. 1994) (holding that statute did not violate free speech, free association, and was not unconstitutionally vague).

<sup>119</sup> See *id.* at 25.

<sup>120</sup> See *id.*

<sup>121</sup> See *id.*

explicit so that a person of ordinary intelligence need not have to guess at its meaning or application."<sup>122</sup>

In *People v. Jensen*,<sup>123</sup> Michigan's knowing transmission statute<sup>124</sup> was challenged on grounds of overbreadth. The defendant asserted that the statute was unconstitutionally overbroad because it criminalized both consensual and nonconsensual acts.<sup>125</sup> The Michigan Court of Appeals, in upholding the statute, looked to the Illinois Supreme Court decision in *People v. Russell*<sup>126</sup> for guidance. The Michigan court held that the defendant's conduct was clearly within the scope of the statute<sup>127</sup> because the defendant engaged in sexual intercourse with the victim while failing to warn him of her HIV-positive status.<sup>128</sup> Therefore the defendant could not merit a claim of overbreadth.<sup>129</sup>

<sup>122</sup> See *id.* at 27. The Illinois statute provides in pertinent part:

Criminal Transmission of HIV. (a) A person commits criminal transmission of HIV when he or she, knowing that he or she is infected with HIV:

(1) engages in intimate contact with another;

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(b) For purposes of this Section:

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'Intimate contact with another' means the exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of HIV.

<sup>123</sup> See *People v. Jensen*, 231 Mich. App. 439 (1998).

<sup>124</sup> See MCL §333.5210; MSA 14.15(5210) states as follows:

(1) A person who knows that he or she has or has been diagnosed as having acquired immunodeficiency syndrome or acquired immunodeficiency syndrome related complex, or who knows that he or she is HIV infected, and who engages in sexual penetration with another person without having first informed the other person that he or she has acquired immunodeficiency syndrome or acquired immunodeficiency syndrome related complex or is HIV infected, is guilty of a felony.

(2) As used in this section, "sexual penetration" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required.

*Id.*

<sup>125</sup> See *Jensen*, 231 Mich. App. at 446. The defendant had argued that the statute "seemingly also compels victims of nonconsensual sex who happen to be HIV or AIDS carriers to inform their attackers of that status." *Id.* In addition, the defendant argued that the statute was unconstitutional because it failed to provide for intent to cause harm. *Id.* at 447.

<sup>126</sup> 158 Ill. 2d 23 (1994).

<sup>127</sup> See *Jensen*, 231 Mich. App. at 447 (stating that "defendant's conduct, i.e., engaging in sexual intercourse with the victim without previously telling him that she was HIV positive is clearly encompassed by the statute's language").

<sup>128</sup> *Id.* at 446. The court described the defendant's conduct as "engaging in sexual intercourse with the victim without informing him beforehand that she was HIV-positive." *Id.*

<sup>129</sup> *Id.* at 447 (holding "[b]ecause a person to whom a statute may constitutionally be

Some states have recognized consent as an affirmative defense to a prosecution under knowing transmission statutes.<sup>130</sup> Where the person exposed knew that the defendant was HIV-positive, but still engaged in sexual relations, this knowledge and consent would negate the intent element of the crime of knowing transmission.<sup>131</sup> In a majority of the states, however, knowing transmission statutes do not provide such a defense.<sup>132</sup> Even where consent has been presented as a trial issue, some courts have disregarded such a defense in cases where the intention to infect was so egregious.<sup>133</sup> Proponents of a consent defense provision argue that a notification defense would encourage those infected to disclose their HIV status to their partners.<sup>134</sup>

applied will not be allowed to challenge that statute on the ground that it conceivably may be applied unconstitutionally to others in situations not before the court, (internal citations omitted) we find no merit in defendant's overbreadth claim").

<sup>130</sup> See ILL. ANN. STAT. ch. 720, para. 5/12-16.2(d) (Smith-Hurd 1993) (stating that consent was defense if "the person exposed knew that the infected person was infected with HIV, knew that the action could result in an infection with HIV, and consented to the action with that knowledge"); FLA. STAT. ANN. § 14-384.24 (West 1993) (providing for defense of consent if person is "informed of the presence of the sexually transmitted disease and [consents] to sexual intercourse"); ARK. CODE ANN. § 5-14-123(b) (Michie Supp. 1992) (stating that "person commits the offense . . . without first having informed the other person of the presence of HIV"); IDAHO CODE § 39-608 (1992) (authorizing that "[i]t shall be an affirmative defense that the sexual activity took place between consenting adults after full disclosure . . . of the risk"); LA. REV. STAT. ANN. § 14:43.5(A) (West 1993) (providing "[n]o person shall . . . without the knowing and lawful consent of the victim"); GA. CODE ANN. § 16-5-60 (Michie Supp. 1992) (prohibiting any HIV infected person from "knowingly" engaging in sexual intercourse without disclosing their infection to his or her partner); TENN. CODE ANN. § 39-13-109(c) (1998) (establishing victim's knowledge that defendant was infected with HIV as affirmative defense).

<sup>131</sup> Interestingly, the affirmative defense of consent has arisen most often in military prosecutions against servicemen. See e.g., *United States v. Morris*, 30 M.J. 1221 (1990). The court rejected the defendant's claim that consent was a defense where his partner was aware of defendant's HIV-positive status while consenting to unprotected sexual intercourse. *Id.* *United States v. Dumford*, 28 M.J. 836 (1989). The court rejected an airman's claim that his partner's consent to sexual relations, when defendant failed to inform her of his HIV-positive status, was a defense. *Id.* *United States v. Johnson*, 27 M.J. 798 (1988). The court held that consent was not a defense to charges of aggravated assault in sexual encounter between teenager and HIV-positive air force sergeant. *Id.* *United States v. Woods*, 27 M.J. 749 (1988). The court upheld a serviceman's conviction despite the prosecutor's failure to allege that the defendant did not inform his partner of his HIV-positive status. *Id.*

<sup>132</sup> See Colloquy, *supra* note 1, at 945 (noting that consent as defense is only applicable in minority of states).

<sup>133</sup> See e.g., *United States v. Johnson*, 27 M.J. 798 (1988); *United States v. Morris*, 30 M.J. 1221 (1990).

<sup>134</sup> See, e.g., MICHAEL L. CLOSEN ET AL., AIDS: CASES AND MATERIALS 712 (1989) (noting that consent defense may promote testing).



## V. SOLUTION

The rise in the number of HIV-specific criminalization statutes may be directly related to the pressures of the political process.<sup>135</sup> Legislators have responded to a number of high-profile cases,<sup>136</sup> which have caused a public outrage over the reprehensible acts of a few individuals. Regardless of the reason behind the enactment of knowing transmission statutes, these laws have been widely accepted as a means of combating the spread of the HIV-AIDS virus.<sup>137</sup>

Despite this acceptance by the public, defendants have consistently challenged the constitutionality of these statutes on grounds of vagueness and overbreadth. Additionally, opponents criticize that these statutes will have a detrimental effect in stopping the spread of AIDS.<sup>138</sup> In the face of these challenges,

<sup>135</sup> See e.g., Gostin, *supra* note 108, at 1629 (stating that "[p]olitical pressures" have been behind recent trends in adopting HIV-specific statutes); Gostin, *supra* note 7, at 1052-57 (arguing against HIV-specific penal statutes); Kathleen M Sullivan & Martha Field, *AIDS and the Coercive Power of the State*, 23 HARV. C.R.-C.L. L. REV. 139, 162-72 (1988) (discussing knowing transmission statutes).

<sup>136</sup> See, e.g., Brazier, *supra* note 3, at F19 (describing local case where HIV-positive man, whom the author describes as "a murderer in disguise," knowingly transmitted virus through sexual intercourse to at least four women); Gostin, *supra* note 3, at Part II, 5 (describing case where defendant was charged with attempted murder for selling his HIV-infected blood to area blood bank); Pristin, *supra* note 3, at M3 (describing charges of attempted murder against defendant for knowingly attempting to transmit HIV to another man through unprotected sex); Reed, *supra* note 3, at B1 (reporting that Los Angeles man was prosecuted for having sex with woman on number of occasions without disclosing his HIV-positive status to her, resulting in infection of both her and child); Robertson, *supra* note 3, at 1 (describing case where woman knowingly infected her former boyfriend with HIV virus); *Man Gets 9-Year Prison Term*, *supra* note 3, at M5 (reporting 65 month prison sentence handed down to HIV-positive individual for attempted murder after he knowingly exposed the HIV virus to seventeen-year-old girl through sexual intercourse).

<sup>137</sup> See REPORT, *supra* note 1, at 130 (1988). The Report noted that the establishment of criminal penalties for HIV-positive individuals engaging in high-risk behaviors will deter the individuals and protect society. *Id.* Colloquy, *supra* note 1, at 933. Commentators suggest that criminalizing this conduct would lead to a decline in such. *Id.* However, the possibility is recognized that criminalization might simply lead to more secrecy regarding one's HIV status. *Id.* Markus, *supra* note 105, at 871. The author notes that HIV transmission / exposure statutes "are preferable in that they make prosecution easier and more successful. . . ." *Id.*

<sup>138</sup> See, e.g., Cordes, *supra* note 107, at 92-93 (noting that criminal prosecutions may have detrimental effect on fight against AIDS); David, *supra* note 30, at 260 (1995) (noting concerns that prosecuting knowing transmission cases may not be effective means of stopping spread of AIDS); Gostin, *supra* note 7, at 1052-57 (arguing against strict penal statutes in attempt to stop spread of AIDS); Hansen, *supra* note 10, at 28 (noting that knowing transmission statutes may discourage individuals from getting tested); McCabe, *supra* note 103, at 775 (arguing that passage of knowing transmission statutes would not be effective in stopping spread of AIDS); O'Toole, *supra* note 2, at 186, 207 (noting that knowing transmission statutes may not be effective in stopping the spread of AIDS);

narrowly-worded, knowing transmission statutes should be enacted in every state.

In drafting knowing transmission statutes, state legislatures should enumerate specific activities known to transmit the HIV virus and which fall within the prohibitions of that statute. Many criminalization statutes as presently drafted include any number of activities that pose little or no risk at all.<sup>139</sup> Criminalization statutes should specifically define the intent necessary to be prosecuted under these statutes, in order to address the difficulties in proving intent in such cases. A carefully drafted knowing transmission statute would punish those who are in fact culpable and give notice to the public of the activities that would subject individuals to prosecution under HIV-specific legislation.

### CONCLUSION

While the sort of effect HIV-specific transmission statutes have in slowing the overall spread of AIDS is debatable, the desire to punish and deter an arguably reprehensible act, namely, knowingly transmitting the HIV virus to another, has been widely accepted. New York should follow the lead of many other jurisdictions throughout the country and adopt an HIV-specific knowing transmission statute. Any adoption of an HIV-specific knowing transmission statute in New York, however, must be viewed as only part of an overall effort to stop the spread of the HIV-AIDS virus. A carefully drafted knowing transmission statute will aid in helping slow the spread of the HIV-AIDS virus by punishing those who commit these reprehensible acts and who are in fact culpable.

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Sharrock, *supra* note 107, at 2 (noting that HIV-specific statutes may lead to decrease in AIDS testing).

<sup>139</sup> See Ruby, *supra* note 30, at 323 (noting that many HIV-specific statutes as written can create "unintended defendants" because of their failure "to exempt specific behaviors or actors"). See generally Pamela Martineau, *Assembly Panel Approves Bill Making Deliberate Transmission of HIV a Felony*, METROPOLITAN NEWS-ENTERPRISE, March 13, 1996, at 11 (noting debate in California whether statute would apply to pregnant women who pass HIV to their children).

